

REMARKS

Claims 1, 2, 4-7, 9, 10, 13, 14, and 17-25 are now pending in the present application. The election of Group D (Figs. 7a-c, and 8a-c) – Claims 1, 2, 4-7, 9, 10, 13, 14, and 17-25 is hereby affirmed. Claims 3, 8, 11, 12, 15, 16, and 26 have been withdrawn pursuant to a restriction requirement. Additionally, Claims 1, 13, 19, 20, 21 and 22 have been amended.

Applicant has carefully studied the outstanding Office Action. The present Response is intended to be fully responsive to all points of rejection raised by the Examiner and is believed to place the application in condition for allowance. Favorable reconsideration and allowance of this application are respectfully requested. No new matter has been added by any of the amendments to the specification. Applicant respectfully requests reconsideration and withdrawal of the Examiner's rejections in view of the foregoing amendments and following remarks.

CLAIM REJECTIONS – 35 U.S.C. § 102

Claims 1, 2, 4, 6, 13, 14, 17, 19, and 21

The Examiner has rejected claims 1, 2, 4, 6, 13, 14, 17, 19, and 21 under 35 U.S.C. § 102(b) as being anticipated by Kawaguchi et al. (U.S. Patent No. 4,615,928). The Examiner has stated that:

Regarding claims 1, 2, and 4, see Figs. 17-20 and Col. 15 lines 46-51. There are lateral hinges at the top and the bottom of panel 202n. The panels are specified in col. 15. The weakened panel is 202n since it is thinner. The panel 202n is curved as seen in Fig. 19.

Regarding claim 6, there are four panels around the container equally spaced.

Regarding claim 13, the process limitations do not require any structure that is not in the reference.

Regarding claim 14, there are lateral hinges at the top and the bottom of panel 202n.

Regarding claim 17, where the panel 202n is curved as seen in Fig. 19.

Regarding claim 19, the upper and lower have a generally circular cross-section and the middle has a generally oval cross-section as seen in Fig. 19. The term generally is a very broad term and allows for a large amount of variation from circular to oval.

Regarding claim 21, there are four panels on the container.

Claims 1, 2, 4, 6, 13, 14, 17, 19, and 21, as amended, are novel despite the teachings of Kawaguchi et al '928. Kawaguchi et al '928 does not teach or suggest that its container has a substantially cylindrical body. Neither does Kawaguchi et al. '928 teach that its open and closed ends have substantially circular lateral cross-sections. While the open end of the Kawaguchi et

al. '928 container shown in Figs. 17-20 appears to have a substantially circular cross-section, its closed base portion includes several thick wall portions **202m** and thin walled portions **202n** which deviate from a substantially circular cross-section. Moreover, the Kawaguchi et al. '928 container shown in Figs. 17-20 appears to inherently require more than two thin walled portions **212n** to ensure proper stability of its container. Finally, unlike the container of the subject invention, the Kawaguchi et al. '928 container appears to be specifically adapted to holding liquids (see column 14, lines 58-59). As noted in the specification of the subject invention (see page 3, lines 9-20), the subject invention is specifically directed at addressing problems inherent with packaging fragile dry food products.

Rejection under §102 for anticipation requires that the single reference teach each and every element or step of the rejected claim. *See, Atlas Powder v. E.I. DuPont*, 750 F.2d 1569, 224 USPQ 409 (Fed. Cir. 1984). A prior art reference anticipates the claimed invention under 35 U.S.C. § 102 only if every element of a claimed invention is identically shown in that single reference, arranged as they are in the claims. *In re Bond*, 910 F.2d 831, 832, 15 U.S.P.Q.2d 1566, 1567 (Fed. Cir. 1990). Examiner's continued rejection under §102 fails to meet this test.

Kawaguchi et al '928 does not show every element of the claimed invention, and therefore, does not anticipate the claimed invention. Thus, a rejection under 35 U.S.C. § 102 is improper. Applicant respectfully requests Examiner to withdraw this rejection.

Claims 1, 2, 4-7, 13, 14, 17, and 18-21

The Examiner has rejected claims 1, 2, 4-7, 13, 14, 17, and 18-21 under 35 U.S.C. § 102(b) as being anticipated by Shimada et al. (U.S. Patent Application No. 2001/002291). The Examiner has stated that:

Regarding claim 1, see Figs. 1-5 where the claimed structure is shown. The panel 8a is the flowing geometries mechanism. The container is capable of being hermetically sealed.

Regarding claim 2, the lateral hinges are the top edge 10 and the bottom edge (12) of panel 8a. The panel is considered weakened since it is deformed inward in response to pressure.

Regarding claim 4, the cross section of the panel is curved as seen in Fig. 2.

Regarding claim 5, see Fig. 1, where the parallel grooves are 16 which are perpendicular at their center of axis. The definition of parallel allows for curved lines or arcs as seen in the reference.

Regarding claim 6, there is one on either side of the body.

Regarding claim 7, the structural rigidity member can be either 16 or 17.

Regarding claim 13, the blow molded does not require any structure that is not in the reference.

Regarding claim 14, the lateral hinges are the top edge 10) and the bottom edge (12) of panel 8a. The panel is considered weakened since it is deformed inward in response to pressure.

Regarding claim 17, see Fig. 2 where panel 8a is curved in lateral section.

Regarding claim 18, see Fig. 1, where the grooves 16 are parallel and the center is perpendicular to the axis.

Regarding claim 19, see Fig. 2, where the upper and lower cross-sections are generally circular since they are rounded and the term "generally" allows for a large amount of variation from exactly circular. The center is generally oval as seen in the same figure.

Regarding claim 20, the hinges make the transition from the oval to the circular and will flex to some degree since they are plastic.

Regarding claim 21, there are two panels on the container, which are equally spaced around the annular periphery.

Claims 1, 2, 4-7, 13, 14, 17, and 18-21, as amended, are novel despite the teachings of Shimada et al. '291. Shimada et al. '291 does not teach or suggest that its container has a substantially cylindrical body. Indeed, the Shimada et al. '291 reference requires that its container have a narrowing neck 1 and shoulder 5. Needless to say, such narrowing of the open end is not conducive to packaging a single stack of fragile articles such as corn chips or the like.

Neither does Shimada et al. '291 teach that its open and closed ends have substantially circular lateral cross-sections. Indeed, the Shimada et al. '291 reference actually teaches away from the presently claimed invention because it teaches that the upper and lower body sections of its container have "substantially rectangular cross section with quadrant corners." (see claim 1 and Fig. 2).

Finally, unlike the container of the subject invention, the Shimada et al. '291 container appears to be specifically adapted to holding liquids (see page 1, ¶ 0009). As noted in the specification of the subject invention (see page 3, lines 9-20), the subject invention is specifically directed at addressing problems inherent with packaging fragile dry food products.

Rejection under §102 for anticipation requires that the single reference teach each and every element or step of the rejected claim. *See, Atlas Powder v. E.I. DuPont*, 750 F.2d 1569, 224 USPQ 409 (Fed. Cir. 1984). A prior art reference anticipates the claimed invention under 35 U.S.C. § 102 only if every element of a claimed invention is identically shown in that single reference, arranged as they are in the claims. *In re Bond*, 910 F.2d 831, 832, 15 U.S.P.Q.2d 1566, 1567 (Fed. Cir. 1990). Examiner's continued rejection under §102 fails to meet this test.

The Shimada et al. '291 reference does not show every element of the claimed invention, and therefore, does not anticipate the claimed invention. Thus, a rejection under 35 U.S.C. § 102 is improper. Applicant respectfully requests Examiner to withdraw this rejection.

CLAIM REJECTIONS – 35 U.S.C. §103(a)

Claims 9, 10, and 22-25

The Examiner rejected claims 9, 10, and 22-25 under 35 U.S.C. §103(a), as being unpatentable over Shimada et al. (U.S. Patent Application No. 2001/002291). The Examiner has stated that:

Shimada et al [291] does not teach the claimed annular corrugations. Zimmer et al. (US D 404,311) as seen in Fig. 1, teaches a similar container where the upper and the lower sections have an annular corrugated pattern thereon. It would have been obvious to employ corrugations of Zimmer et al. [311] in the bottle of Shimada et al [291] to strengthen the upper and lower sections and make the bottle more visually appealing. At some point along the bottle the pattern is perpendicular to the axis of the bottle.

This rejection is respectfully traversed. Claims 9-10 depend from Claim 1; and Claims 22-25 depend from Claim 13. The arguments previously raised with regard to the Shimada et al. '291 reference are incorporated by reference. With regard to the Zimmer '311 design patent, Applicant would note that design patents are concerned solely with the ornamental appearance of an article of manufacture. (See MPEP 1503.01). While the specific disclosure of structure in a design patent may inherently teach functional features, see *In re Garbo*, 287 F.2d 192 (1961), there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify or combine reference teaching (see MPEP 2143.01). Here, there is none. The Zimmer '311 patent only discloses that its ornamental design is directed at “a bottle.” The structure of the bottle is not disclosed. Indeed, it is not inherently clear that the Zimmer '311 container is a lightweight, thin-walled blow molded thermo-plastic container. One of ordinary skill looking at Fig. 6 could easily surmise that the bottle is not of blow molded construction, but rather of a thick glass construction as the bottom is perfectly flat. Moreover, there is no inherent indication that the corrugations are anything more than an ornamental design. Thus, the prior art cited by Examiner does not, either alone or in combination, teach or disclose every element of Applicant's invention.

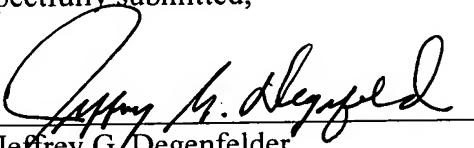
It is well established that as a part Examiner's burden to establish a *prima facie* case of obviousness, Examiner is required to show that the referenced teachings "appear to have suggested the claim subject matter." *In re Rinehart*, 531 F.2d 1048, 189 USPQ 143, 147 (C.C.P.A. 1976). As stated by the Federal Circuit, "Obviousness cannot be established by combining teachings of the prior art to produce the claimed invention, absent some teaching suggestion or incentive supporting the combination." *In re Geiger*, 815 F.2d 683, 2 USPQ 2d 1276, 1278 (Fed. Cir. 1987). Neither Shimada et al. '291 nor Zimmer '311, either alone or in combination, teach or disclose every element of Applicant's invention. Examiner's failure to provide the necessary suggestion or motivation for the combination of Shimada et al. '291 and Zimmer '311 creates a presumption that the combination selected by Examiner to support the obviousness rejection is based on hindsight. Examiner has not established a *prima facie* case of obviousness, and the rejection of claims 9, 10, and 22-25 should be withdrawn.

CONCLUSION

Applicant has adopted the Examiner's suggestions where applicable and believes the claims are in condition for allowance. It is respectfully urged that the subject application is patentable over references cited by Examiner and is now in condition for allowance. Applicant requests consideration of the application and allowance of the claims. If there are any outstanding issues that the Examiner feels may be resolved by way of a telephone conference, the Examiner is cordially invited to contact Jeffrey G. Degenfelder at 972.367.2001.

The Commissioner is hereby authorized to charge any additional payments that may be due for additional claims to Deposit Account 50-0392.

Respectfully submitted,

By: 
Jeffrey G. Degenfelder
Registration No. 44,647
Attorney for Applicants

Date: July 7, 2005
CARSTENS & CAHOON, LLP
P.O. Box 802334
Dallas, TX 75380
(972) 367-2001 *Telephone*
(972) 367-2002 *Facsimile*